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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DARRYL EDWARD BROWN, Defendant and Appellant.	G054855 (Super. Ct. No. 94NF2864) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Alana Butler, Laura Baggett and Craig Russell, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Darryl Edward Brown appeals from the denial of his petition for resentencing pursuant to Proposition 36. He contends there was insufficient evidence to support the trial court's finding beyond a reasonable doubt that he was ineligible for resentencing relief due to a prior forcible rape conviction. We affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Brown's Rape Conviction*

We described the evidence relating to Brown's rape conviction in our prior opinion as follows.

"In a second amended information in September 1996, the prosecutor charged Brown with methamphetamine possession, a felony at that time (former Health & Saf. Code, § 11377, subd. (a)), and alleged Brown suffered seven prior strike convictions. As pertinent here, the information alleged Brown 'was previously convicted of a violent/serious felony offense, a violation of [s]ection 261 of the California Penal Code (Rape of [J. A. B.]), in the Superior Court of the County of Alameda, State of California, on and about the 19th day of December, 1974, case # 58194.' A jury found Brown guilty on the possession count and, in a bifurcated proceeding, the trial court entered a true finding on four of the prior strike convictions.

"Brown's probation officer prepared a report for the sentencing hearing, and in the report recounted Brown's prior offenses in a lengthy 'rap sheet' obtained from the California Bureau of Criminal Identification and Information. The first entry the probation officer listed on Brown's lengthy adult record included a count for '261 PC (Rape)' charged in 1974, and listed the disposition for that offense as '261.3 PC (Rape By Force), sentenced [to] 6-months-to-life.' At the sentencing hearing, the trial court imposed a sentence of 25 years to life under the Three Strikes law.

"Brown appealed, and a panel of this court affirmed his sentence in an unpublished opinion. A footnote in the opinion noted 'rape' among Brown's 'prior strike

convictions,' in addition to assault with a deadly weapon, robbery, and first degree burglary." (*People v. Brown* (Dec. 29, 2016, G052221) [nonpub. opn.].)

It is undisputed that no police report or court documentation relating to the rape conviction are available.

B. *Brown's Ineligibility for Resentencing Relief Pursuant to Proposition 47*

In February 2015, Brown filed a petition in the trial court under Proposition 47 to recall his sentence and redesignate his felony methamphetamine conviction as a misdemeanor. The court denied the petition on the ground that "[d]ue to criminal records defendant is not suitable under Prop[osition] 47." Specifically, the trial court concluded that Brown had suffered a prior conviction for forcible rape, and the forcible rape conviction rendered him ineligible for relief under Proposition 47. This court affirmed "the trial court's order because substantial evidence support[ed] it." (See *People v. Brown* (Dec. 29, 2016, G052221) [nonpub. opn.].) We concluded that "the probation report alone supports the trial court's ruling." (*Ibid*.)

C. *Brown's Petition for Resentencing Relief Pursuant to Proposition 36*

Brown also filed a petition for resentencing under Penal Code section 1170.126. (All statutory references are to the Penal Code unless otherwise designated.) The District Attorney opposed the petition, arguing that Brown was ineligible for relief because he had suffered a conviction for forcible rape. In support, the prosecutor cited this court's prior opinion and the probation report referenced in our opinion. The prosecutor also submitted a certified California Law Enforcement Telecommunications System (CLETS) rap sheet, which the prosecutor asserted "is the same rap sheet that was relied upon in the probation and sentencing report." The CLETS rap sheet showed Brown was convicted of "261.3 PC-Rape By Force."

The trial court concluded Brown was ineligible for resentencing relief. It found beyond a reasonable doubt that Brown had suffered a prior conviction for forcible rape, and ruled that the "conviction makes him ineligible for consideration under

Prop[osition] 36." The court's finding was based on this court's prior opinion, the certified rap sheet – which the court found "comport[ed] with the Evidence Code" – and "the probation report, and it says on page 6 there was a disposition in Alameda Superior Court Case 58194, that [] Brown was convicted of rape by force."

II

DISCUSSION

In November 2012, California voters approved Proposition 36, which revised the Three Strikes law to reduce the punishment prescribed for certain third strike defendants. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C); *People v. Conley* (2016) 63 Cal.4th 646, 651.) Proposition 36 also authorized defendants presently serving third strike sentences to seek resentencing under the amended penalty scheme by filing a petition to recall the sentence. (§ 1170.126, subd. (b).) However, a defendant is ineligible for resentencing relief if he or she previously suffered, among other prior convictions, a conviction for a "'sexually violent offense,'" as defined by subdivision (b) of Section 6600 of the Welfare and Institutions Code. (See 1170.12, subd. (c)(2)(C)(iv)(I).) Under Welfare and Institutions Code section 6600, a sexually violent offense includes rape (§ 261) "when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person." (Welf. & Inst. Code, § 6600, subd. (b).)

As we noted in our prior opinion, a conviction for forcible rape also renders a defendant ineligible for resentencing relief under Proposition 47. (See *People v. Brown* (Dec. 29, 2016, G052221) [nonpub. opn.]; see also *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1101 (*Sledge*) [defendant's juvenile adjudication for forcible rape is a disqualifying prior conviction under section 1170.18, subd. (i)].) We also concluded the probation report alone was sufficient to support the trial court's finding that Brown had suffered a prior conviction for forcible rape. Accordingly, if admissible in a

Proposition 36 proceeding, the probation report would suffice to support the trial court's eligibility determination here.

The California Supreme Court has never addressed "what sources a court may consider when making an eligibility determination" under Proposition 36. (*People v. Estrada* (2017) 3 Cal.5th 661, 676, fn. 7.) However, our high court has not overruled *People v. Bradford* (2014) 227 Cal.App.4th 1322 (*Bradford*), which held that the trial court was limited to evidence that may be considered to prove a sentencing enhancement. (*Id*. at pp. 1337-1338.) In *Bradford*, the eligibility determination depended on the conduct underlying the current conviction. Specifically, the factual question was whether the defendant was "'*armed with a firearm or deadly weapon*" during the current offense. (*Id*. at p. 1339.) If so armed, the defendant would be ineligible for resentencing relief under Proposition 36. (See *id*. at pp. 1328-1329.) The *Bradford* court held that in making such a factual determination, the trial court was limited to the "record of conviction," as the term was used in *People v. Woodell* (1998) 17 Cal.4th 448 (*Woodell*) and *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*). (See *Bradford, supra,* 227 Cal.App.4th at p. 1337-1339.) In ruling that the trial court was limited to the record of conviction, the *Bradford* court acknowledged that *Guerrero* and *Woodell* involved the "parameters under which a prior conviction may be proved as an enhancement" in a pending criminal case whereas the instant matter concerns "a threshold eligibility determination" in "a unique postconviction proceeding." (*Bradford*, *supra*, 227 Cal.App.4th at pp. 1338 & 1340.) Despite this important distinction, the holding in *Bradford* has been applied consistently in subsequent Proposition 36 cases.

Brown argues that *Guerrero* and its progeny limited the record of conviction to the criminal proceedings involving the prior conviction at issue. (See, e.g., *People v. Trujillo* (2006) 40 Cal.4th 165, 179 [defendant's postplea admissions in probation report not part of a document in the "'record of the prior criminal proceeding'" from which the nature or basis of the prior crime].) Because the probation report was

prepared for the 1996 criminal proceeding, Brown argues it is not part of the record of conviction for the 1974 criminal proceeding resulting in the rape conviction. Thus, he argues the probation report cannot be used to prove he suffered a prior conviction for forcible rape. We disagree.

Guerrero's evidentiary limitations – that a court may only look to the record of conviction – apply only to proof of "'the circumstances of the prior crime.'" (*People v. Martinez* (2000) 22 Cal.4th 106, 118 (*Martinez*).) For example, *Guerrero* and its progeny do not preclude the prosecution from using CLETS reports and other uncertified computer printouts of criminal history information to prove a defendant served prior prison terms for prior convictions. (*Martinez, supra*, 22 Cal.4th at pp. 111-112, 118.) Similarly, the trial court here was not precluded from using the probation report, which summarized the defendant's criminal history, to find that Brown was previously convicted of forcible rape.

Brown does not dispute that he suffered a rape conviction, but argues that there was no admissible evidence showing he was convicted of *forcible* rape. Brown misunderstands the trial court's eligibility finding. The trial court did not find that Brown suffered a rape conviction, and then rely on the probation report and other evidence to determine the rape was committed by means of force. Rather, the court found, based on the probation report and the certified CLETS rap sheet, that Brown was convicted of forcible rape. The nature or circumstances of the force to commit that forcible rape is irrelevant to the Proposition 36 eligibility determination.

To the extent that Brown contends the statements in the probation report do not correctly reflect his prior rape conviction, it is his burden on appeal to demonstrate any error. As noted, the statements in the probation report summarized Brown's criminal history as reflected in his rap sheet. The prosecutor here also submitted a certified CLETS rap sheet which showed Brown suffered a prior conviction for forcible rape. Our Supreme Court has held that given the presumption in Evidence Code section 664 that

California law enforcement and courts regularly perform their statutory duty to report criminal history information, the burden was on the defendant to prove the information was incorrect. (*Martinez, supra*, 22 Cal.4th at pp. 126 & 130.) Moreover, as the high court noted, with respect to the CLETS rap sheet, the "Legislature statutorily established a process for review and correction of the criminal history information." "Applicants who 'desire [] to question the accuracy or completeness' of anything in their records 'may submit a written request' to the Department [of Justice], including a statement of the alleged inaccuracy or omission and 'any proof or corroboration available.' [Citation.] The Department must then forward the request to the agency that provided the questioned information, which must review the request and report its conclusion to the Department within 30 days. [Citation.] A reviewing agency that agrees with the applicant must correct its records and notify the Department and others to which it has sent the incorrect record. The Department must then correct its records, notify the applicant of the correction within 30 days, and notify those to which it has sent the incorrect record." (*Id*. at pp. 131 & 132.)

Here, Brown has not met his burden to demonstrate the CLETS rap sheet is incorrect. Brown argues that the statement in the CLETS rap sheet is inconsistent with prior statements stating he was arrested and cited for rape. But the statement about the arresting charge does not cast doubt on the statement about the subsequent criminal conviction. In sum, the trial court could rely on the statements in the probation report summarizing Brown's criminal history to find beyond a reasonable doubt that Brown suffered a prior conviction for forcible rape. Accordingly, the court properly denied Brown's Proposition 36 petition because he was ineligible for relief.

III

DISPOSITION

The trial court's postjudgment order denying Brown's petition is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.